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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-124

JACK ALKIRE, ET AL.,
Petitioners,

vs.

DR. JOHN W. CASHMAN, ET AL.,
Respondents.

RESPONDENTS, MOODY AND JACKSON, BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion and Order of the District Court and the Sixth Circuit Court of Appeals are set forth in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioners claim in their Questions Presented that fluoridation of the City of Columbus water system (hereinafter referred to as the "City System") was effected as a result of *Ohio Rev. Code* §6111.13 (hereinafter referred to as the "Act") and if the Act is found to be unconstitutional as violative of their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, then ordinances of the City of Columbus which effected fluoridation of the City System must also be unconstitutional. Respondents Moody and Jackson, as was ably stated by the District Court, have always asserted that fluoridation of the City System was accomplished not pursuant to the mandate of the Act, but pursuant to Columbus Municipal Ordinances Nos. 1739-71 and 1162-72, passed *vis a vis* the City's powers of local self-government as guaranteed by the Constitution of the State of Ohio.

Thus, the constitutionality of the Act is not relevant or dispositive of the issues before this Court. The only question to be decided is the following:[1]

> Does the Constitution of the United States Prohibit the Council of the City of Columbus From Effecting Fluoridation of the City Water System for the Protection of the Health, Safety and Welfare of the Citizens so Served by the City Water System?

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[1] Other state issues and the question of constitutional impairment are discussed by Respondent Cashman and are fully discussed by the District Judge in the Opinion and Order from the District Court (App. A of the Petition).

FEDERAL, STATE, AND MUNICIPAL STATUTES AND CONSTITUTIONAL PROVISIONS APPLICABLE

Other than the Ohio Constitutional provisions set forth below, the Petition sets forth all applicable statutes and constitutional provisions. The Ohio Constitution, Article XVIII, Sections 3 and 7, provides as follows:

> "3. Powers. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
> "7. Local self-government. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

ARGUMENT

1. The Decision To Fluoridate The Columbus Water System Is A Proper Exercise Of The Legislative Function Of The Council Of The City Of Columbus And Is Not Violative Of The State Of Ohio And United States Constitutions.

Fluoridation of the City System is within the Ohio Constitutional powers of Home Rule granted to the City of Columbus pursuant to the Constitution of the State of Ohio (§§3 and 7 of Article XVIII of the Constitution of the State of Ohio) and has a reasonable relation to the public health, morals, safety and welfare of the citizens so served by the City System.

The syllabi in *Kraus v. Cleveland*, 163 Ohio St. 559 (1955), *appeal dismissed for want of a substantial Federal question*, 351 U.S. 935 (1956), read as follows:

"1. Prevention and control of dental caries, a common disease of mankind, is a proper subject, in relation to public health, for legislation enacted pursuant to the police power vested in municipalities by the general laws of the Constitution of the State of Ohio.

"2. The enactment of legislation by the City Council of Cleveland providing for fluoridation of the Cleveland water supply, by the introduction of inorganic fluoride chemicals therein, constitutes neither an infringement of the constitutional liberties of the citizens of such municipality nor an exercise of power in contravention of the general laws in relation to adulteration for the practice of medicine."

The Supreme Court of Ohio, in *Kraus, supra,* held that under the Constitution of the State of Ohio, municipal legislative bodies have the power to determine for their cities whether fluoridation of the municipal water system will take place. Whether fluoridation of a municipal water system takes place pursuant to the Home Rule powers of the municipality or pursuant to *Ohio Revised Code* §6111.13 (which petitioners have properly stated requires fluoridation of city water systems unless a referendum on such question is affirmatively voted) is of no consequence. The only question to be resolved is whether the legislative body of the City of Columbus is prohibited by the United States Constitution to resolve in the affirmative the question of fluoridation of the City System. This Court stated in the case of *Paris Adult Theater v. Slaton,* 41 U.S.L.W. 4935, ___ U.S. ___ (1973) that:

"It is not for us to resolve empirical uncertainties underlying state legislation save in the exceptional

case where the legislation plainly impinges upon rights protected by the constitution itself . . . ."

[41 U.S.L.W. at p.4938.]

"The fact that a Congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find the statute unconstitutional."

[41 U.S.L.W. at p.4939.]

Neither this Court, nor any court, should "sit as a super-legislature to weigh the wisdom of legislation" [*Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)] when such legislation is properly placed before the legislative body and the effects of such legislation do not *plainly* impinge upon specific rights protected by the United States Constitution. As will be discussed *infra*, every court, both state and federal, which has been presented with the issues before this Court, has determined that fluoridation is a proper matter for legislative determination and does not plainly impinge upon any rights guaranteed by the United States Constitution. [See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1904) and *Murphy v. California*, 225 U.S. 623 (1912).]

2. This Court Is Not Presented With A Substantial Federal Question.

The question of whether a municipality may constitutionally fluoridate its water system, either pursuant to its Home Rule powers or pursuant to a directive by the state legislature, has been decided in the affirmative by the Ohio Supreme Court [*Kraus v. City of Cleveland*, *supra*, and *State, ex rel., Lehmann v. Cmich*, 23 Ohio St.2d 11 (1970)]; by the Sixth Circuit Court of Appeals in the case at bar and in *Crawford v. City of Detroit*,

389 F.2d 1001 (C.A. 6th, 1968); and by the highest court in many other states. [*Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1956), *appeal dismissed for want of a substantial Federal question*, 348 U.S. 892 (1954); *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961), *appeal dismissed and cert. denied*, 371 U.S. 8 (1962), *reh. denied*, 371 U.S. 906 (1962); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955); *Opinion of Justices*, 243 A.2d 716 (Del. 1968); *Schuringa v. Chicago*, 30 Ill.2d 504, 198 N.E.2d 326 (1966); *Miller v. Evansville*, 219 N.E.2d 900 (Ind. 1966); *Baer v. Bend*, 292 P.2d 134 (Ore. 1956) and *Birnel v. Fircrest*, 335 P.2d 819 Wash. 1959).

This Court has held in the past that there are certain restraints which individuals in our society must be subject to in order to provide for the health, safety and welfare of the citizens within the jurisdiction imposing such restraints. [*Jacobson v. Mass., supra*, pp. 25-26, upholding the Massachusetts compulsory vaccination law.] The controversial nature of fluoridation has been recognized by the many courts which have been presented with, and decided, the constitutional issues presented therein. This Court has in the past refused to accept certiorari in cases in which the issues were identical to those presented by the petition. *(Kraus, supra; Chapman, supra; Readey, supra;* and *Dowell, supra.)* Fluoridation has taken place in hundreds of cities and towns throughout the United States. If this Court were to change its previous opinions with respect to the substantiality of the issues presented herein, and ultimately reverse the Sixth Circuit, great confusion and difficulty (if not impossibility) could result throughout the United States if an effort to reverse the seemingly irreversible fluoridation process was to take place.

CONCLUSION

Petitioners are requesting that this Court issue a Writ of Certiorari to determine the constitutionality of ordinances which effected fluoridation of the Columbus, Ohio, water system. The highest court of the State of Ohio, the Sixth Circuit Court of Appeals, and many State Supreme Courts have unanimously held that a municipality has the constitutional right to fluoridate its water system. There is no conflict in any jurisdiction in regard to this issue. The mere fact that the question of fluoridation is controversial in nature has been recognized by the judiciary, but that alone should not be grounds for this Court to act as a superlegislature and intervene into questions which are reserved to the respective legislative bodies to which the question is presented.

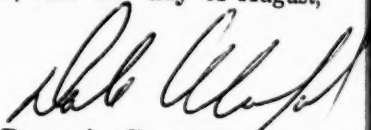
Respectfully submitted,

DALE A. CRAWFORD, Senior Assistant
City of Columbus Department of Law

JAMES J. HUGHES, JR., City Attorney
City Hall, 90 West Broad Street
Columbus, Ohio 43215
614-461-7385
Counsel for Respondents Moody & Jackson

CERTIFICATE OF SERVICE

I, Dale A. Crawford, hereby certify that three copies of the foregoing Brief of Respondents were delivered to Lyman Brownfield, Attorney for Petitioners, 88 East Broad Street, Columbus, Ohio 43215; and William J. Brown, counsel for Respondent Cashman, State House Annex, Columbus, Ohio 43215, this 13 day of August, 1973.



DALE A. CRAWFORD